A PENUMBRA OVERLOOKED: THE FREE EXERCISE CLAUSE AND *LAWRENCE V. TEXAS*

BENJAMIN M. EIDELSON*

INTRODUCTION

Three years after *Lawrence v. Texas*[1] was decided, the jurisprudential significance of the case has not faded, and the political passions it initially evoked have not cooled. In particular, critics continue to charge the *Lawrence* Court with intervening directly in the ongoing "culture war," grossly overstepping its proper role of enforcing the people's own armistice lines by enforcing existing law.[2] In a show of unabashed hubris and hypocrisy, we are told, the majority relied upon its own judgment as to the scope of the "liberty" John Geddes Lawrence and Tyron Garner were "due," rather than on any constitutional rule proscribing sodomy laws.[3] In effect, the Court's detractors argue that the Constitution is simply silent on the question of same-sex intercourse, yet the Justices presumed to speak in its name anyway—with a nominal nod to the most general, and therefore the most plastic, of all constitutional clauses.[4]

Despite an outpouring of work interpreting and analyzing Justice Kennedy's *Lawrence* opinion—what exactly it says,[5] whose philosophies it

---

* B.A. Candidate, Department of Political Science, Yale University, Class of 2008. I am grateful to Josh Bendor, Roy Eidelson, Jed Glickstein, Oona Hathaway, Alex Potapov, Matthew Wansley, and Justin Zaremby for their insightful comments on a draft of this Note. I owe a special debt to Akhil Amar, for both his insights and his exceptionally generous mentorship.

[1] 539 U.S. 558 (2003).

[2] *See, e.g.*, Edward Whelan, *The Meta-Nonsense of Lawrence*, YALE L.J. (THE POCKET PART), May 2006, http://www.thepocketpart.org/2006/06/whelan.html; *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1603–04 (2004); Ron Paul, *Federal Courts and the Imaginary Constitution*, RON PAUL'S TEXAS STRAIGHT TALK, Aug. 11, 2003, http://www.house.gov/paul/tst/tst2003/tst081103.htm.

[3] *See* Whelan, *supra* note 2 (arguing that "Justice Kennedy blithely abandons the stare decisis principles that he helped cook up in *Planned Parenthood v. Casey* as a pretense for not overturning the then nineteen-year-old precedent of *Roe v. Wade*"); Lund & McGinnis, *supra* note 2, at 1578 ("In *Lawrence* . . . nothing is left except bombast and the naked preferences of Supreme Court majorities.").

[4] *See, e.g.*, Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 44 (2005); Lund & McGinnis, *supra* note 2, at 1582.

[5] *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004); Katherine M. Frank, *Commentary: The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L.

embraces,[6] and the future developments it foretells[7]—scholars have done too little to engage this basic charge against *Lawrence*'s holding. To be sure, the general debate over whether constitutional rights must be spelled out explicitly in order to "count" for the purposes of judicial review, or whether they may reasonably be inferred from the text's capacious language, remains active.[8] But a defense of *Lawrence*'s holding need not turn on that broad philosophical question. After all, many skeptics of this decision agree that the Constitution protects some unenumerated rights. They simply doubt that so general a command as the Due Process Clause can be used to answer so specific a question as whether the Constitution protects same-sex intercourse, without personal preferences seeping in and controlling the outcome.

Plato once defined the whole of justice as "giving each man his due."[9] If the theory of *Lawrence* is effectively that the Due Process Clause demands justice, and justice includes a right to same-sex intercourse, then the Constitution really does none of the work that decides the case—an alarming conclusion for those who trust federal judges in matters of law, but not morality.[10]

Regardless of whether Justice Kennedy's opinion is persuasive as written, it might have won over a broader audience if it had been grounded in text that speaks more specifically to the issue at hand. With this in mind, the present Essay proposes an alternative argument for the result in *Lawrence*—one that aims to better capitalize on the specific insights of the con-

---

REV. 1399 (2004); Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of* Lawrence v. Texas, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 96–118 (2005); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27.

[6] *See, e.g.*, Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, *in* CATO SUP. CT. REV., 2002–2003 (James L. Swanson ed., 2003); Paul M. Secunda, Lawrence*'s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117 (2005).

[7] *See, e.g.*, Marybeth Herald, *A Bedroom of One's Own: Law and Sexual Morality after* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1 (2004); Brett McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004); Ruth E. Sternglantz, *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in* Lawrence v. Texas, 153 U. PA. L. REV. 1097 (2005).

[8] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1997); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 37–47 (1998); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

[9] PLATO, THE REPUBLIC § 331e (Richard W. Sterling & William C. Scott trans., Norton 1985).

[10] *See* Lund & McGinnis, *supra* note 2, at 1603–04. Of course, constitutional doctrine plays an important role in Justice Kennedy's analysis as well: the Court approaches what a person is "due" not only from the perspective of its own moral sense, but also from the perspective of its previous decisions regarding contraceptive use and abortion. *See* Lawrence v. Texas, 539 U.S. 558, 564–66 (2003). Still, no appeal to precedent can sidestep the fact that the *Lawrence* Court is pronouncing on whether sodomy laws violate a right found in the Constitution—with past decisions bearing only indirectly on that question.

stitutional text, and thereby to defend the holding on the terms of those who criticize it as unfaithful to the Constitution. In particular, I argue that the dispute in *Lawrence* ought to be considered in light of the text, history, and ethic of the Free Exercise Clause of the First Amendment.

In the first part of this Essay, I employ historical sources from the Founding and Reconstruction to argue that the animating principle of the Free Exercise Clause reaches and favors the right of gays to engage in same-sex intercourse. In a brief second part, I then sketch a more general defense of arguments from the principles and ethics embodied in specific constitutional texts, arguing that these present a valuable "third way" for tackling the problem of unenumerated rights—neither blunting the Constitution's general provisions, nor contorting them so as to fit any and every conceivable policy preference.

I. Free Exercise and Same-Sex Intercourse

A. Why Free Exercise?

Several commentators have noted that, taken broadly, the question presented in *Lawrence* is among the most fundamental in political theory.[11] The petitioners claim that when it comes to matters central to a person's identity and essential to her pursuit of happiness, the individual has the right to privately contravene the dictates of a moral majority.[12] In an insightful analysis of Justice Kennedy's opinion, Jamal Greene explains that *Lawrence* embraced this argument by endorsing a broader principle of "metaprivacy"—a rule "that when an individual's status is defined by conduct, the state may not outlaw that conduct on moral grounds."[13] As Greene points out, of the various contenders, this principle enjoys the best fit with Justice Kennedy's logic and rhetoric.[14] But without more, a refined rule of metaprivacy will be no greater consolation to critics than an unspecified commitment to "liberty," for while metaprivacy elegantly rationalizes Justice Kennedy's conception of the individual's "due," it appears to say little about the Constitution's conception of anything.

Still, considering the philosophical importance of the petitioners' claim, it would be stunning if the Constitution, the particular political philosophy we have given the force of law, did not somewhere speak to the question. And sure enough, the Court's rhetoric in *Lawrence* gestures toward the text where the Constitution does establish a right of individual auton-

---

[11] *See, e.g.*, Barnett, *supra* note 6; Secunda, *supra* note 6.

[12] *See* Reply Brief of Petitioners at 5, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) (arguing that "[i]n this most personal realm of human existence, the Constitution limits government's power to substitute the preferences of the majority for the individual choices of adults").

[13] Jamal Greene, *Beyond* Lawrence: *Metaprivacy and Punishment*, 115 Yale L.J. 1862, 1874–75 (2006).

[14] *See id*. at 1867–82.

omy akin to Greene's metaprivacy. After explaining that the case implicates liberty "both in its spatial and in its more transcendent dimensions,"[15] Justice Kennedy quotes a passage from his joint opinion in *Planned Parenthood v. Casey*:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[16]

Reading this ode to freedom of conscience out of context, we would assume that it valorized not the Due Process Clause, but the Free Exercise Clause—the Constitution's guarantee that, in America, "the free exercise" of "religion" shall not be "prohibit[ed]."[17]

To be sure, it is an open and controversial question how far this clause's protected liberty extends. What should count as "religion" for the purposes of this provision? How strict is the requirement that "free exercise" not be "prohibit[ed]"—that is, what exactly does it mean to "prohibit," or to exercise one's religion "free[ly]"? Does the Clause require affirmative exemptions from generally applicable laws that obstruct religious practices? These are deep and difficult questions, each a necessary step toward determining what exactly the Constitution has to say about individual autonomy and freedom of conscience.

Unlike the Due Process Clause, however, the First Amendment at least enshrines the right kind of right: it is in the First Amendment that the philosophical question of autonomy from morals legislation receives its constitutional answer, whatever that may be. For what is at stake in individual religious freedom, I will argue, is precisely a right to engage in certain normatively charged, status-defining conduct. In tackling the claim to such a right in *Lawrence*, we will be better off mining the People's own effort to enshrine a personal right of conscience in the Constitution than struggling to navigate the maze of judicial criteria that surrounds the Due Process Clause.[18]

---

[15] *Lawrence*, 539 U.S. at 562.

[16] *Id*. at 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

[17] U.S. CONST. amend I. In its text, the Amendment addresses its injunction only against Congress, but the application of the Amendment to the entirety of the federal government has been reaffirmed so many times, and is so pervasive in contemporary scholarship, that I take it for granted here. On the important question of the Amendment's incorporation against the states, see discussion *infra* Part I.B.2.

[18] *See* Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (requiring that an "asserted fundamental liberty interest" be "careful[ly] descri[bed]"); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion) (appealing to whether a claimed right is "deeply rooted in this Nation's history and tradition"); Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (appealing to whether "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as

Admittedly, under a narrow understanding of "religion," the Free Exercise Clause is more an embarrassment for the holding in *Lawrence* than a basis for it. "The framers knew how to enact just such a substantive right to autonomy when they wanted to," the argument goes, "and they explicitly chose to limit that right to activities which fall within the scope of religion." If we conclude that the Free Exercise Clause speaks directly to individual moral autonomy, but does not extend far enough to cover a right to same-sex intercourse, this argument might be compelling.[19] But conversely, if we embrace the notion "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"[20]—and if we also conclude that the principle underlying protection for "religion," like metaprivacy, embraces a right to same-sex intercourse—then we will weave this right into the constitutional fabric more tightly than the Court has so far managed with Due Process alone.

B. The Principled Genesis of Free Exercise

The question, then, is whether gays as a group possess characteristics similar to the characteristics of religious minorities that motivated the adopters of the Free Exercise Clause, and later the adopters of the Fourteenth Amendment, to protect religion.[21] The answer is complex because it has evolved over time. It is tempting to assume ahistorically that the principle underlying free exercise must reach gays because it reaches all secular claims of autonomy, calling into question all morals legislation. After all, isn't the principle underlying the protection of religious liberty the great principle of classical liberalism—that when the individual imposes no harms on others, she should be free to formulate and pursue her own

---

they have been understood by the traditions of our people and our law").

[19] *But see* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[20] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[21] This question is easily confused with a different sort of historical inquiry sometimes performed in constitutional law. I am not asking here what the original "Application" or "No-Application" understandings of the Free Exercise Clause were with respect to homosexuality. *See* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 14 (2005). For one thing, our present conception of homosexuality as a trait did not emerge until the nineteenth century. As Michel Foucault famously explained, "the sodomite was a recidivist, but the homosexual is now a species." 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (1978). As such, talk of protections for "gays," a group of people, would simply have made no sense to members of the First Congress or state ratifying conventions. Regardless, the question here is not what the adopters of the Free Exercise Clause thought about its underlying principle as applied to gays, nor even what they would think if we could transport them to the present and inform them of the modern social meaning of homosexuality. The question is simpler than that: do the reasons for protecting religion also function as good reasons for protecting gays? An affirmative answer to even this relatively modest question goes a long way toward grounding the right to same-sex intercourse in the Constitution. *See infra* Part II.

conception of "the good?" This is, of course, the venerated conclusion of John Stuart Mill's *On Liberty*.[22] Accepting Mill's libertarian principle would certainly lead one to protect freedom of religion, so in that sense it clearly accounts for the Free Exercise Clause.

Moreover, for many in the modern world, God has become a quaint cultural artifact at best, and a corpse at worst.[23] As theology declines in authority, Nietzsche observed, people increasingly resort to their own "revaluation of values."[24] In principle, why should these new schemes of meaning be treated any differently from the old ones? Conveniently, on the libertarian account, they should not.

Finally, any rigorous definition of "religion" might seem doomed to expand to the full breadth of Mill's "harm principle" anyway.[25] "Beliefs about God" is a natural first candidate for what "religion" encompasses, but upon consideration it proves too exclusive. Buddhism, for example, is arguably a non-theistic worldview, but intuitively (and according to the Court's jurisprudence), it ought to count as a "religion."[26] What, then, of Secular Humanism?[27]

It quickly begins to appear that, if we are to capture modern intuitions, the only workable candidate for the essence of religion may be a scheme of moral first premises or values assumed without proof—that is, faith, however it manifests itself for the individual.[28] On this view, freedom of religion flows from a very general freedom of conscience, or the freedom to hold different beliefs from the majority as to what is right and wrong. Just as the freedom to hold theistic beliefs includes a freedom to "exercise" them through religious practice, the underlying freedom to hold conscientious or moral beliefs of all kinds would include a parallel freedom to "exercise" one's conscience—that is, to make private choices unencumbered by the moral judgments of political majorities.[29] One's con-

---

[22] JOHN STUART MILL, ON LIBERTY 139 (David Bromwich & George Kateb eds., 2003) (1859).

[23] FRIEDRICH NIETZSCHE, THE GAY SCIENCE § 125 (Bernard Williams et al. eds., Cambridge Univ. Press 2001) (1887).

[24] FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY § 1.7–1.8 (Keith Ansell-Pearson et al. eds., Cambridge Univ. Press 1994) (1887).

[25] *See* MILL, *supra* note 22, at 139.

[26] Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

[27] *See id.* (referring to Secular Humanism as a "religion" along with Buddhism).

[28] For extensive efforts to define "religion" in the First Amendment, see Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969).

[29] Throughout, I intend "private" to describe conduct in accordance with a rough version of Mill's "harm principle." *See* MILL, *supra* note 22, at 139. As such, actions that harm non-consenting parties do not fall into this category—even if, colloquially, they take place in a "private" bedroom rather than the "public" square. By my usage, for example, marital rape is not private.

sensual sexual choices would certainly fall within the sweep of this principle.

Mill's libertarian principle is appealing as an explanation for freedom of religion because it frames that right in terms of values—individualism and pluralism—which resonate today. Ultimately, however, the Free Exercise Clause, like the constitutional whole, "is too complex . . . to lie still for *any* pat characterization."[30] To be sure, one principle at stake in American religious freedom bears at least a family resemblance to Mill's, as we shall see when we turn to Reconstruction.[31] But it took the additional weight of other, more specific principles to tip the balance in favor of protecting religious free exercise, especially at the Founding.

1. The Founding Free Exercise Principle

Evidence suggests that the libertarian explanation is a poor historical fit for the Founding Free Exercise Clause. In particular, Professor McConnell points to the Senate's textual substitution of "free exercise of religion" for James Madison's original language, "the rights of conscience," as strong evidence that secular claims were viewed differently.[32] As McConnell argues, the revision suggests either that "conscience" was understood in the narrowly religious sense, so the phrases were considered interchangeable, or that the language was deliberately altered to ensure the exclusion of nonreligious claims of conscience. Both explanations point equally to the fact that the adopters saw something distinctive about religion that merited special autonomy, and were not similarly moved by the full ambit of comparable secular claims.

The question, then, is whether there is something distinctive about the secular claims of gays that suggests the more specific principles that support protecting religions should operate to protect the secular claims of gays as well. Let me say from the outset that, while an important thread with this implication is to be found at the Founding, I do not claim that it captures the dominant reason that early Americans saw fit to protect religious freedom. For its authors and proponents, the Bill of Rights was a federalist document first and foremost; it was not until Reconstruction that individual claims of autonomy came to the fore.[33] Nevertheless, as we shall see, the arguments of early American advocates for religious freedom do evince a principled concern about laws which, because they will fail to deter the conduct they proscribe, will amount to instruments of ongoing persecution.

---

[30] JOHN HART ELY, DEMOCRACY AND DISTRUST 101 (1980).

[31] *See* discussion *infra* Part I.B.2.

[32] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1494–96 (1990).

[33] *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000).

Historical sources for analyzing the Free Exercise Clause are sadly "less than abundant," particularly as compared to the neighboring Establishment Clause.[34] The lack of extensive recorded debates over the Clause means that interpreters have no choice but to rely more heavily on the assumption that it descended directly from its analogues in state constitutions, regarding which more information is available. Fortunately, the dearth of recorded debate over the federal Free Exercise Clause also suggests, albeit indirectly, that this assumption is justified—for the Clause would only have passed the First Congress with minimal debate if there was already a broad consensus as to its meaning, and this would likely only have been the case if it was understood to have the same meaning as the analogous provisions in the state constitutions of the day.[35]

Free exercise provisions first began to appear in their modern form in colonial charters. The Rhode Island Charter of 1663 was the first to promise colonists "the free exercise and enjoyment of all their civil and religious rights, appertaining to them, as our loving subjects."[36] By the time the federal Bill of Rights was adopted in 1789, every state but Connecticut had included some provision akin to a Free Exercise or Right of Conscience Clause in its constitution.[37] The Massachusetts Constitution of 1780 was typical in providing that:

> no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.[38]

Several other states made similar guarantees employing the particular language of "free exercise." For example, Georgia's Constitution promised: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."[39] This

---

[34] Office of Legal Policy, Dep't of Justice, Report to the Attorney General: Religious Liberty under the Free Exercise Clause 2 (1986) [hereinafter Report to the Attorney General].

[35] *Id*. at 4. *But see* Steven D. Smith, Foreordained Failure (1995) (arguing that the national religion clauses were federalism provisions, of only jurisdictional significance). It is apparent from the writings of at least some key proponents of the religion clauses, however, that for many these provisions expressed a general commitment to separation of church and state. *See infra* note 48 and accompanying text.

[36] R.I. Charter of 1663, *reprinted in* 2 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1596 (B. Poore ed., 2d ed. 1878) (spelling modernized) [hereinafter Federal and State Constitutions].

[37] McConnell, *supra* note 32, at 1455. For a convenient reprinting of all of these provisions, see *id*. at 1457 n.242.

[38] Mass. Const. of 1780, art. II, *reprinted in* 1 Federal and State Constitutions, *supra* note 36.

[39] Ga. Const. of 1777, art. LVI, *reprinted in* 1 Federal and State Constitutions, *supra* note 36.

trend is apparently traceable to James Madison, whose proposal was accepted by the Virginia Assembly in formulating its influential 1776 Declaration of Rights.[40] This document provided:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conscience, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience.[41]

This text merits close study because it "was widely distributed among the states and served as a model for other declarations of religious free exercise."[42] And it is particularly illuminating, because the language leading up to "therefore" appears to function in the manner of a "whereas" clause, stating the legislative rationale in the text itself. Such provisions are interpretive goldmines because they short-circuit a standard concern about historical analysis—that only the text itself, and not particular adopters' beliefs about it, is ratified by the formal legislative process. Taking Virginia's legislative statement of purpose seriously, then, note that the Declaration claims not just that religion ought to be directed "only by reason and conscience," but that it only *can* be. One important feature of religion at the Founding was apparently the belief that it was simply intractable to coercion.

Why was this thought to be the case? First, there is an important theological answer, rooted in the Protestant ethic of Martin Luther. Drawing on St. Augustine's influential distinction between the "City of Man" and the "City of God,"[43] Luther held that the state functions as the temporal "hangman . . . that hinders me from sinning, as chains, ropes, and strong bands hinder bears, lions, and other wild beasts from tearing and rending in pieces all that come in their way."[44] According to Luther, this primitive confinement is all the state can accomplish. As such, "the Law does not justify," for "forceful restraint cannot be regarded as righteousness, rather as an indication of unrighteousness."[45] That is, because God is ultimately concerned with a person's inner life, and because force cannot lead a person to abstain from sin for the right reasons, promoting true religion through

---

[40] REPORT TO THE ATTORNEY GENERAL, *supra* note 34, at 5.

[41] VA. DECLARATION OF RIGHTS of 1776 § 16, *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 545–52 (J. Boyd ed., 1950).

[42] REPORT TO THE ATTORNEY GENERAL, *supra* note 34, at 5; *see also* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION 70 (John J. Patrick & Gerald P. Long eds., 1999).

[43] *See* ST. AUGUSTINE, THE CITY OF GOD (Robert Dyson et al. eds., Cambridge Univ. Press 1998); 4 HARTMANN GRISAR, LUTHER 458 (E. M. Lamond trans., Luigi Cappadelta ed., 2d ed. 1914).

[44] MARTIN LUTHER, TABLE TALK CCLXXIV (William Hazlitt trans., George Bell and Sons 1902).

[45] MARTIN LUTHER, COMMENTARY ON THE EPISTLE TO THE GALATIANS 130 (T. Graebner trans., 1949).

law is futile. Spiritual claims fall within an entirely different "jurisdiction," as it were, than do those which civil society is equipped to handle.[46] Professor McConnell attributes a similar claim to Madison, who proposed in his *Memorial and Remonstrance* that man owes a distinct duty "to the Creator . . . precedent both in order of time and degree of obligation, to the claims of Civil Society," and that this sphere "must be left to the conviction and conscience of every man."[47]

Beyond this theological or jurisdictional account, however, there is a more straightforward rationale for deeming matters of religion intractable to coercion. Some apparently believed that a religious person's motive to disobey a law which violated his conscience was simply unusually strong. Consequently, in cases of conflict, the threat of legal sanction would do little to deter a religious believer. John Leland, the influential leader of the Virginia Baptists and one of the key agitators for a federal Bill of Rights, employed an argument like this in support of robust protections for religious liberty.[48] Leland's views merit special attention because, as McConnell explains, "the drive for religious freedom was part of [the] evangelistic movement."[49]

In an important pamphlet, Elder Leland lamented that "often . . . laws are made which prevent the liberty of conscience; and because men cannot stretch their consciences like a nose of wax, these non-conformists are punished as vagrants that disturb the peace."[50] The principle here is subtle but provocative. On this view, what distinguishes religious morals legislation is simply that, because the stakes are so high for the dissenter, it is likely to lead to punishment. Whatever the law says, people motivated by their religious beliefs will follow their consciences, because as Leland pointed out elsewhere, "government can[not] answer for individuals at the day of judgment."[51] Similarly, John Witherspoon, the only clergyman to sign the Declaration of Independence and the nation's leading Presbyterian authority, warned that "the servants of God . . . will not, and dare not comply with the sinful commandments of men."[52] The consequence is that because their religious commitments are inflexible, when

---

[46] REPORT TO THE ATTORNEY GENERAL, *supra* note 34, at 27.

[47] James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 THE WRITINGS OF JAMES MADISON 183–85 (G. Hunt ed., 1901); *see also* McConnell, *supra* note 32, at 1453.

[48] Joseph L. Conn, *Legacy of Liberty: Revolutionary-Era Pastor John Leland Fought to Protect Religion from Government Influence*, CHURCH & STATE, Oct. 2004; s*ee also* McConnell, *supra* note 32, at 1448.

[49] McConnell, *supra* note 32, at 1438.

[50] John Leland, *The Yankee Spy*, *in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (L. Greene ed., 1945).

[51] John Leland, *The Rights of Conscience Inalienable*, *in* THE WRITINGS OF THE LATE ELDER JOHN LELAND, *supra* note 50 at 181.

[52] John Witherspoon, *The Charge of Sedition and Faction Against Good Men, Especially Faithful Ministers, Considered and Accounted For*, *in* 2 THE WORKS OF THE REV. JOHN WITHERSPOON 415, 427 (1802); *see* McConnell, *supra* note 32, at 1446.

those commitments run afoul of law, people who have done nothing to "injure the life, liberty or property of another" will frequently be punished as if they were "vagrants that disturb the peace."[53]

By way of contrast, consider seatbelt laws. There is good reason to think that people will wear their seatbelts if the government enacts and seriously enforces a law establishing that they must, because putting on a seatbelt poses such a trivial cost to the individual in the first place. Thus we can honestly believe that with the new incentive structure in effect, society will rarely be put in the distasteful position of actually enforcing the paternalistic punishments it prescribes, harming and stigmatizing people who have not injured anyone.

Elder Leland's insight is that the same is not true when religious motives are involved. A person who sincerely objects to a law on religious grounds has little chance of being deterred from the disfavored behavior, so legislating against her practice will have no effect other than to fix her with "contempt and opprobrious names."[54] Laws obstructing free exercise are objectionable, then, because they require invasive and perpetual punishment of those whose practices they condemn. Such an ongoing crusade would distinguish religious legislation from other paternalistic laws, and would surely recall the "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause."[55]

The fact that laws prohibiting religious free exercise are ineffective as deterrents is important in another respect as well. Consider Dean Ely's argument that immutability should often trigger suspicion under the Equal Protection Clause.[56] On Ely's view, laws which impose burdens on the basis of immutable characteristics are constitutionally suspect because a typical legislative justification—the goal of encouraging or deterring certain outcomes—is unavailable in these cases. It would make no sense, for example, for a legislator to justify imposing special burdens on blacks as an effort to deter people from being black. As such, Ely concludes that the lack of a viable consequentialist rationale can be an important hint that the real legislative motive is simple animus.[57]

This principle provides a second explanation for the emphasis placed on noncompliance in Founding arguments for protecting freedom of religion. Whether religion is theoretically mutable or not, if the reality is that laws targeting religiously motivated behaviors will fail to deter them, then such laws become suspect as vehicles for heaping intentional harm on a pre-fixed group—those who will predictably break the law. Such a concern follows from a broader principle of legislative generality that figures

---

[53] Leland, *supra* note 50, at 221, 228.
[54] Leland, *supra* note 51, at 182.
[55] Bowen v. Roy, 476 U.S. 693, 703 (1986).
[56] ELY, *supra* note 30, at 154.
[57] *Id*.

prominently elsewhere in the document, particularly in the Bill of Attainder and Ex Post Facto Clauses.[58] This worry, that it is too easy for legislators to predict whom religious legislation will punish, further helps to explain Leland's argument and Virginia's conclusion—that simply because religious practices are invulnerable to legal coercion, their free exercise ought to be protected.

How might these ethical reasons for protecting religious free exercise apply to gays? Admittedly, the theological or jurisdictional account does not apply at all, because it is uniquely linked to the religious ideology of distinguishing between divine and human law. Elder Leland's argument, however, applies rather forcefully to gays. On my expansion of Leland's position, free exercise rights are grounded in a condemnation of laws which, because they will fail to achieve compliance, (i) will become mere instruments of perpetual persecution, and (ii) are suspicious as expressions of legislative animus from the outset. Because this principle extends to all morals legislation that targets behaviors whose motivations are not pliant "like a nose of wax," it certainly frowns upon sodomy laws.[59]

Empirically, the neurological mechanisms of the sex drive are different for gay people than for straight people. As a matter of biochemistry, both gay men and lesbians process certain pheromones more like straight people of the opposite sex than like straight people of their own sex.[60]

Regardless of whether sexual orientation is innate or acquired, then, we at least have evidence that suggests that requiring gay people to refrain from intercourse with people of the same sex is asking just as much as demanding that straight people refrain from intercourse with people of the opposite sex. In other words, sexual partners of the opposite sex are as poor a substitute for gay people as partners of the same sex would be for straight people. Naturally, then, gay people are unlikely to comply with the demand to refrain from same-sex intercourse, just as pious people are unlikely to obey laws that defy their religious commitments. In this important respect, therefore, sodomy laws are precisely the kind of invidious morals legislation that Elder Leland—and by a chain of historical extension, the Virginia Baptists, the Virginia Assembly, the state constitutions, and ultimately the federal Free Exercise Clause—sought to prevent.[61]

---

[58] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–2, § 10–4 (2d ed. 1988). *See also* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996).

[59] Leland, *supra* note 50.

[60] Ivanka Savic et al., *Brain Response to Putative Pheromones in Homosexual Men*, 102 PROC. NAT'L ACAD. SCI. 7356 (2005); Hans Berglund et al., *Brain Response to Putative Pheromones in Lesbian Women*, 102 PROC. NAT'L ACAD. SCI. 8269 (2006).

[61] I have endeavored to justify this chain of inference throughout, but it bears repeating here:

(a) Leland spoke for the Baptists in Virginia. *See supra* note 48 and accompanying text.

(b) The Baptists and related groups led the charge for protecting religious freedom at the state level. *See supra* note 49 and accompanying text.

This might seem to imply the broad and dubious proposition that all morals legislation is suspect when applied to people who oppose it. In fact, it has this implication only in a very limited sense. Specifically, criminalizing any private conduct runs afoul of this principle in proportion to the likelihood it will fail to deter, and will therefore require aggressive and perpetual enforcement. My point is that the special motives of religious people and gays place them together at one extreme of this spectrum. A person who believes that he is charged with executing God's will, and subject to divine punishment should he fail, is effectively compelled to disobey a law that gets in his way. Similarly, if only because of biological imperatives, a person who is prohibited by law from having sex with everyone she is biochemically attracted to is nearly certain to break the law.[62]

Note, however, that it is really the sodomy laws themselves that are extraordinary in this respect, not the strength of the drive to break them. For example, a law requiring that parents hand over their children to be raised by the state would implicate a comparably strong motive to disobey, and would be similarly fraught with noncompliance. But such a law would be overwhelmingly rejected if proposed. What is distinctive about sodomy laws in contrast to others that contravene strong biological or existential imperatives is that, in many states, they pass legislative muster.

To summarize: one influential reason for proscribing religious legislation at the Founding was that it would simply fail to change anyone's practice. I have suggested a few reasons why such laws might have been seen as not merely useless, but harmful: because their enforcement burdens the dissenter for no gain; because they raise the specter of ongoing persecution; and because they arouse suspicion of legislative motives. Finally, both the principle and these underlying rationales extend to protecting gays from sodomy laws, because, like religious legislation, these laws ask the people they target for unrealistic and improbable sacrifices.

To be sure, while this argument against religious legislation is noteworthy, the central theme of the First Amendment at the Founding is to be found elsewhere.[63] Like the entirety of the Bill of Rights, its dominant

---

(c) The Virginia Assembly's Declaration was disseminated and emulated throughout many states. *See supra* note 42 and accompanying text.

(d) And the federal Free Exercise Clause was modeled on state constitutions. *See supra* note 35 and accompanying text.

[62] My claim here raises a concern about how the principle applies to people who are bisexual. On this point, *see infra* text accompanying notes 100–106. Also, let me emphasize here that my description of gay people's sex drive as an unusually strong motive or a compulsion is not meant to carry any pejorative or demeaning connotation. In an effort to forswear such an interpretation, I have directly compared this motive to two other pressures that are, in our culture, less stigmatized: straight people's sex drive, and the desire to fulfill religious obligations. When Elder Leland lamented that religious people could not "stretch" their religious motives "like a nose of wax," he certainly didn't mean this to condemn or objectify them. Leland, *supra* note 50 and accompanying text. My point with respect to gays is similar.

[63] *See* Kurt Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemp-*

concern was institutional structures—state and federal, church and state—rather than individual freedoms.[64] My point, consistent with that view, is simply that important seeds of a relevant constitutional principle were sown at the Founding. They did not blossom until the Civil War fundamentally restructured our constitutional order.

2. The Reconstruction Free Exercise Principle

Even when analyzed under a First Amendment rationale, the Fourteenth Amendment remains at the heart of the constitutional dispute over sodomy laws, because these are laws enacted by state governments. As such, what matters most about the Free Exercise Clause here is not its "original" original meaning, but rather its original meaning as filtered through and refined by the Fourteenth Amendment during its incorporation against the states.[65] This is much more than a technical point, for there is good reason to believe that the Reconstruction experience altered the hue of American religious freedom substantially.[66]

We can see this shift from the perspective of the text alone by considering the conduit through which freedom of religion was to be incorporated, the Privileges or Immunities Clause of the Fourteenth Amendment.[67] The fact that the Free Exercise Clause was deemed to fall within the sweep of this provision, which forbids the states from "maki[ng] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States,"[68] necessarily implies that freedom of religion was conceptualized as a "privilege" or "immunit[y]" of American "citizen[s]."

---

tions Under the Fourteenth Amendment, 88 NW. U. L. REV. 1106, 1110–17 (1994).

[64] *See generally* AMAR, *supra* note 33.

[65] See generally *id*. for a discussion on "refined incorporation."

[66] *See* Lash, *supra* note 63.

[67] *See* AMAR, *supra* note 33, at 183 (arguing that the Privileges and Immunities Clause was the intended mechanism for incorporation). This broad topic is too involved to treat fully here. Suffice it to say that free exercise rights were widely held to be protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Professor Lash writes:

> Citing Article IV, Section 2, of the Constitution, Henry Wilson listed the free exercise of religion as one of the "privileges and immunities" violated by slavery. Senator Jacob Howard, discussing the content of the Privileges or Immunities Clause of the Fourteenth Amendment, listed, among other rights, "the personal rights guaranteed and secured by the first eight amendments to the Constitution." As noted previously, Congressman Hart believed that the rebel states should not be readmitted until they set up a government whose "'citizens shall be entitled to all privileges and immunities of other citizens;' where 'no law shall be made prohibiting the free exercise of religion.'" In the Forty-second Congress, Henry L. Dawes declared that the Privileges or Immunities Clause had "secured the free exercise of . . . religious belief."

Lash, *supra* note 63, at 1147–49 (footnotes omitted).

[68] U.S. CONST. amend. XIV, § 1.

This formulation is noteworthy for two reasons. First, rather than a general principle of governmental structure or federalism, this language describes a particular and personal entitlement of individual citizens, an essential ingredient in an ethic of personal autonomy.[69] Second, the Clause's terms hint at a familiar distinction in modern political philosophy, that between the "priv[ate]" and public spheres—the former "immun[e]" from regulation and the latter subject to it. As Professor Amar has observed, one plausible implication of this etymological-textual argument might be that a person's freedom to practice her religion is constrained only by Mill's harm principle—losing its "immunit[y]" only when it is not "priv[ate]."[70] But a second implication can also be drawn, one that helps to determine how far the underlying principle extends to secular claims of autonomy.

If, within the reconstructed paradigm, religious freedom is protected because of a determination as to its place or function—that religion falls within the private and immune sphere to which citizens are entitled[71]—then whether the underlying principle applies to a particular secular claim turns on whether it occupies the same sphere as religion in the citizen's life, rather than whether it is akin to religion in its content.[72] This gives us good reason to endorse the suggestion that free exercise after Reconstruction may have stood for "libertarian autonomy from governmental intrusion in ways that it did not in the 1790s."[73] But it should lead us to take this claim a step further as well: free exercise may also have meant libertarian protection for a fuller range of behaviors, on the basis of their "priv[ate]" and therefore "priv[ileged]" nature, than those protected on account of their religious content at the Founding.

On this question—whether, as compared to the original Constitution, the Fourteenth Amendment embraces religion more for its moral and personal place and less for its formal content—the history is in harmony with the subtleties of the text. As Professor Lash explains:

> [T]he activities intended to be protected under the incorporated Free Exercise Clause were vastly different from those anticipated at the Founding. Although some persisted in limiting the free exer-

---

[69] *See* Lash, *supra* note 63, at 1150.

[70] AMAR, *supra* note 64, at 256.

[71] For a related suggestion that the Fourteenth Amendment draws a sharp distinction between a private or civil sphere and a public or political sphere, see *id.* at 217 (arguing that the Amendment deliberately did not embrace "political rights" such as voting, militia service, jury service, and office-holding).

[72] Without approaching the question from this historical perspective, the Court has sometimes come to a very similar conclusion. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 340 (1970) (construing "religious training or belief" broadly for the purposes of conscientious objector status, because some secular "beliefs certainly occupy in the life of that individual a place parallel to that filled by . . . God in traditional religious persons") (internal quotation marks omitted). For further discussion, *see infra* text accompanying notes 122–123.

[73] AMAR, *supra* note 33, at 256.

> cise of religion to worship, others declared that religion "consists in the performance of all known duties to God and our fellow men." The rights of conscience were repeatedly linked with such activities as assisting runaway slaves, teaching literacy, and engaging in religiously motivated political discourse.[74]

The nexus between Reconstruction freedom of conscience and slavery is particularly fruitful. For example, John Bingham lamented the paradigmatic violation of religious freedom which occurred when "the State of Illinois, could make it a crime . . . for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread."[75]

True, the imperative in Bingham's example comes from "our divine Master." But I am not arguing that the adopters of the Fourteenth Amendment meant to remove the requirement of "religion" from the Free Exercise Clause. Rather, my argument is that for their purposes, the principle beneath religious freedom had different and more general contours than it had at the Founding. Specifically, in the aftermath of slavery, the Republican effort to protect religious exercise was undertaken with a special sensitivity to the plight of the dissenter from a tyrannical and misguided moral majority—a position many of the Amendment's supporters had experienced first-hand. In principle, religious motives are certainly not inherent to this predicament. Thus, after Reconstruction, we might well view religious freedom as paradigmatic of a right of metaprivacy—a privilege to confront normatively charged questions of unusual personal weight in a private sphere.[76]

Applying this transformed principle to gays is straightforward, for sodomy laws plainly deprive the most intimate, personal, and private of choices of any "immunity" from public scrutiny. Here Justice Kennedy's *Lawrence* rhetoric seems appropriate once again:

> [M]atters . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[77]

---

[74] Lash, *supra* note 63, at 1151–52 (footnotes omitted).

[75] CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (remarks of Rep. Bingham).

[76] I employ the language of "paradigms" here in Jed Rubenfeld's sense. *See* RUBENFELD, *supra* note 21, at 15–18.

[77] Lawrence v. Texas, 539 U.S. 558, 574 (quoting Planned Parenthood v. Casey, 505

One critic of *Lawrence* has decried this passage as a judicial embrace of "insipid New Age solipsism."[78] But the very same words that might seem an inapt or presumptuous exposition of the Due Process Clause present an insightful portrait of the principle at stake in the Free Exercise Clause, as re-glossed by the Privileges or Immunities Clause. One's judgments on fundamental questions of "meaning," including self-defining conduct in one's private life—whether regarding the abhorrence of slavery or the permissibility of homosexual relationships—fall within a privileged sphere of individual liberty.[79]

To summarize, then, John Bingham's asserted right to fulfill his religious duty to aid a slave seems a powerful paradigm case for a broader right to define oneself through normative commitments to minority viewpoints and to live out this status through conduct in conformity with the harm principle.[80] Such acts of self-definition comprise a category of conduct quite unlike religious exercise in its formal content, but deeply akin to religious exercise in the personal place it occupies.

Finally, then, to adhere closely to the paradigm of religiously motivated opposition to slavery, and bearing in mind the insights of the Founding free exercise principle, we might add or clarify one constraint on the force of the metaprivacy principle—that for a secular claim to hold a station comparable to the paradigm case, it must be of unusually substantial weight, akin in some sense to "an injunction of our divine Master."[81] For the reasons discussed above, the claims of gays seem particularly compelling on this standard, but it is possible that other exceptional secular claims might fit as well.[82]

If at this point the application of the religious liberty principle to gays still sounds outlandish, consider the fictional case of *Hypothetical Gay Equality Sect v. Texas*. The facts are straightforward. A group of gay and straight theologians gather together and declare themselves the founders of a new Hypothetical Gay Equality Sect ("H.G.E.S."). These pious American citizens find it inconceivable that God would have intended a minority of His children to lead lonely, unfulfilled lives, while expressly commanding the rest to build intimate relationships with each other. Accordingly, the coreligionists re-gloss St. Paul's command that "each man should have his own wife, and each woman her own husband," interpreting it to

---

U.S. 833, 851 (1992)).

[78] Whelan, *supra* note 2.

[79] To be clear, I do not mean to assume that being gay, or believing that same-sex intercourse is morally permissible, must define the entirety of a person's identity or moral code in the way that religion often does. But religion does not have to be totalizing in this way either, and the reconstructed Free Exercise Clause surely extends its protection to those for whom religion answers only some moral questions.

[80] *See* RUBENFELD, *supra* note 21.

[81] CONG. GLOBE, *supra* note 75.

[82] *See supra* text accompanying notes 60–61.

require gay relationships as well.[83] They thus make it a precept of their dogma, and an affirmative religious duty, that a gay person should strive to find a partner, just as a straight person is obligated to search for a husband or wife. Predictably, as the Sect begins to gain ground in the broader Christian community, it triggers a furious backlash from the Christian Right. Social conservatives, decrying same-sex intercourse as an "abomination,"[84] successfully agitate for the enactment and enforcement of sodomy laws in jurisdictions where they had not previously existed or had rarely been enforced.[85]

Whatever one thinks of *Lawrence v. Texas*, we should agree at this point that *H.G.E.S. v. Texas* calls for a straightforward application of the post-Reconstruction Free Exercise Clause, as incorporated by the Fourteenth Amendment. For if these constitutional provisions mean anything, they mean that members of the Hypothetical Sect may freely engage in activities that they believe to be required by an "injunction of [their] divine Master." As we have seen, so long as their religious conduct is suitably private, it falls within the citizens' sphere of immunity from state meddling.[86] A challenge to these sodomy laws ought to be sustained, then, by a perfectly natural extension of the First and Fourteenth Amendments' core application to slavocratic laws that forbade dissenters from fulfilling their religious obligations.[87]

Admittedly, the textual warrant for *H.G.E.S.* turns on the fact that the Hypothetical Sect is a "religion." But is the underlying principle limited in the same way? What seems to matter here, in light of the reconstructed free exercise principle, is that the conduct is motivated by a fervent and sincere belief about morality, and that it meets the libertarian requirement

---

[83] 1 *Corinthians* 7:2.

[84] *Leviticus* 18:22 (King James).

[85] Related issues have arisen in real litigation. *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc). In this case, Robin Shahar's job offer as a staff attorney for Georgia's Department of Law was withdrawn when senior members of the Department learned that she intended to be married to another woman in a Jewish ceremony. Shahar claimed, among other constitutional violations, that her right to free exercise had been infringed. *See also* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 93–101 (2006).

[86] *See* AMAR, *supra* note 33, at 256.

[87] Note that, for the purposes of this hypothetical, I deviate from the Court's no-exemptions reading of the Free Exercise Clause in *Employment Division v. Smith,* 494 U.S. 872 (1990). To bracket this concern, simply imagine that *H.G.E.S. v. Texas* was argued in the late 1980s while the *Sherbert v. Verner* test was in effect. 374 U.S. 398 (1963). After all, the mere fact that the Hypothetical Sect ought to have won its case between 1963 and 1990 should suffice to demonstrate the plausibility of religion-like protections for gays, which is all this hypothetical sets out to do. My ultimate proposal is not for protecting the right of religious gays to engage in same-sex intercourse because this is required of them by their religion, but rather for protecting the right of gays in general to engage in same-sex intercourse because this practice parallels religious conduct in the relevant ways. This distinction is important because, although we must imagine that *H.G.E.S. v. Texas* was argued before *Smith*, I believe my actual proposal for *Lawrence* can be accommodated under *Smith*. *See infra* text accompanying notes 92–98.

of the harm principle. If a group of gays expressed similar beliefs about the integrity of intimacy to the human experience, but did so in purely humanistic terms, the principle justifying striking down the sodomy laws would hardly evaporate. (If it seems to, because the weight of a divine command is especially great, recall that the natural pressure on gays to disobey a sodomy law is unusually strong as well.)[88] Indeed, even the doctrinal justification for striking down the laws might well remain intact in this modified scenario.[89]

Finally, then, what if a gay person unconnected to any institutional structure made no declaration of dogma at all, because she thought her entitlement to a fundamental aspect of human experience went without saying? A narrow reading of the constitutional text certainly treats such a case differently, but the underlying principle, viewed through the lens of Reconstruction privileges and immunities, does not. After all, the Fourteenth Amendment enshrines free exercise as a privilege of individual "citizens," not churches, so the principle should not turn on whether a moral dissenter adheres to the stated dogmas of a formal association.[90] In short, there may be a sound intuition underlying the Court's idiosyncratic practice of referring to gay people, in quasi-religious terms, as "practicing homosexuals."[91]

What this somewhat whimsical thought experiment underscores, I hope, is this: while religiously motivated private opposition to slavery is an illuminating paradigm case for reconstructed free exercise rights, the essence of this paradigm is defined by only its personal and moral dimensions. Forged in the crucible of the nation's greatest moral controversy, the post-Reconstruction right of religious free exercise flows from an ethic of respect for personal autonomy with regard to private, status-defining questions of moral significance.

C. Responding to Concerns

I have highlighted two important principles at stake in American religious freedom. First, there is a Founding-era concern for thwarting persecution—grounded in the belief that because legislation that impinges on religious practices is unusually demanding, it will fail to deter, and will therefore require persistent enforcement and punishment. Second, there is a refined principle from Reconstruction—that by virtue of their equal citizenship, each American is entitled to take his own view of the

---

[88] *See supra* text accompanying notes 60–61.

[89] *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (recognizing humanistic belief systems as "religions").

[90] *See* Thomas v. Review Bd., 450 U.S. 707, 715 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."); Lash, *supra* note 63, at 1150.

[91] Lawrence v. Texas, 539 U.S. 558, 566, 573 (2003); Bowers v. Hardwick, 478 U.S. 186, 188 (1986).

existential questions facing the nation, and to act on his view within a sphere of privilege and immunity. I have suggested that, because of its private nature and the unique demands that being gay places on an individual, both of these ethics embrace a right to same-sex intercourse for gays. Indeed, to synthesize the two historical elements, the core of the free exercise principle protects private conduct which is of unusual personal significance and which, because it is compelled by an unusually strong imperative, is not subject to normal forces of deterrence.

A student of the Court's free exercise jurisprudence might object that, with *Employment Division v. Smith*[92] on the books, it hardly matters whether sodomy laws are akin to laws proscribing religious practices. For if we extend the analogy and parse *Lawrence* in free exercise terms, sodomy laws may seem to parallel a statute criminalizing peyote: by prohibiting particular conduct generally, both impose heavy burdens on the members of one group specifically. Under *Smith*, we might then conclude, sodomy laws would be constitutional even if the issue were conceived in terms of free exercise principles, since the statutes in question are formally neutral and generally applicable.

The facts in *Lawrence* sidestep this concern, however, because the relevant provision of the Texas Penal Code criminalizes only "deviate sexual intercourse with another individual of the same sex."[93] If we are to apply the insights of free exercise doctrine, therefore, peyote does not present the best model for analyzing *Lawrence*. Rather, more relevant is the Court's decision to strike down a facially neutral ordinance that banned the ritual animal sacrifice performed by practitioners of Santería, while exempting nearly all other animal killing, including kosher slaughter.[94] The ordinance did not single out Santería explicitly, but "careful drafting ensured that, although Santería sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."[95] Because "[t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt," Justice Kennedy concluded, such "religious gerrymanders" are unconstitutional.[96]

As such, if we extend religious-type protection to gays, Texas's "homosexual conduct law" cannot survive even under the lax standard in effect since *Smith*. Like an ordinance effectively singling out Santería sacrifices, Texas's law punishes only same-sex intercourse—conduct as tightly linked to being gay as ritual sacrifice is to being a member of the Santería church.[97] On the other hand, if, contra *Smith*, religious exemptions are sometimes

---

[92] 494 U.S. 872 (1990).

[93] TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003), *invalidated by Lawrence*, 539 U.S. 558 (2003).

[94] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[95] *Id*. at 536.

[96] *Id*. at 534.

[97] *See supra* text accompanying notes 60–61.

constitutionally required, my analysis suggests that whether or not they single out same-sex intercourse, all sodomy laws are unconstitutional as applied to gays.[98]

My account raises two other concerns. First, if the reconstructed free exercise principle protects same-sex intercourse as a weighty and personal act of normative self-definition, its umbrella may not reach a person who holds the moral belief that same-sex intercourse is impermissible. Accordingly, unlike the Court's holding in *Lawrence*, my proposal is theoretically of no help to a person with an openly conservative moral code who is arrested for violating a sodomy law. This may sound at first like an odd or unfavorable resolution to the problem, but on reflection it proves essential to preserving the power of the states to enact morals legislation on most issues, most of the time—that is, when a powerful claim of conscience is not involved—and thus to dodging the bullet of Justice Scalia's dissent.[99]

Second, my Founding account appears to raise a more troubling concern—that only people who are "truly" and "exclusively" gay could claim the principle's protection. Someone who is bisexual, for example, has opportunities for intimacy even with sodomy laws in effect, and might therefore be more likely to be deterred by them. Obviously, if they are to respect diversity and privacy, courts cannot be put in the business of evaluating the strength and orientation of a person's sex drives to determine whether sodomy laws apply to her.

This is the most important limitation of conceptualizing a right to same-sex intercourse in terms of religious freedom. It can be mitigated substantially, however, because it is not unique to this particular application of the religious liberty principle. In other words, we should keep in mind that religious convictions are not neatly categorized or uniformly forceful either. Indeed, the Supreme Court has held specifically that a religious belief can be sincere even if the believer is "struggling" with it.[100] As such, the key point for claims of religious freedom may be that, considered as a category, religious legislation targets a dimension of people's lives that cannot be easily altered to accommodate state directives. This much is certainly also true of a person's sexual identity. Accordingly, the free exercise principle implies a right to same-sex intercourse even for people who are not "purely" homosexual, just as paradigmatic religious liberties extend to people who are not, as a matter of private fact, "purely" or uncompromisingly religious.

---

[98] I do not intend by this remark to take a stance on whether *Smith* was rightly decided. Because the issue remains controversial, however, it seems worthwhile to point out that a free exercise approach to *Lawrence* would be viable either way.

[99] Lawrence v. Texas, 539 U.S. 558, 599 (Scalia, J., dissenting) (arguing that the Court opinion "effectively decrees the end of all morals legislation").

[100] Thomas v. Review Bd., 450 U.S. 707, 715 (1981). *See also* REPORT TO THE ATTORNEY GENERAL, *supra* note 34, at 53–56.

It is certainly true, however, that the free exercise approach to *Lawrence* would in principle extend less protection to avowedly straight people, merely engaging in sexual experimentation, than the Court's holding does. Analytically and doctrinally, this feature is an important virtue. Justice Kennedy's opinion is difficult to parse on this point, because it appears to strike down sodomy laws in general while insisting that the intervention is specially warranted to ensure "homosexual persons" the right to engage in conduct which "can be but one element in a personal bond that is more enduring."[101] If Justice Kennedy is right that the unusual burden sodomy laws impose on gays is essential to distinguishing these laws from other morals legislation—as I have argued it is—then the Court's apparent decision to invalidate sodomy laws even as applied to straight people makes little sense. This theoretical point is not trivial, for it goes to the heart of the myriad slippery-slope charges leveled against the *Lawrence* Court.[102]

Specifically, by focusing on a right to sexual autonomy, or a right to same-sex intercourse, rather than a right to same-sex intercourse *for gays*,[103] the Court invited the accusation that it has "decree[d] the end of all morals legislation."[104] The free exercise approach extends no such invitation, because while a right to same-sex intercourse may be difficult to distinguish from a right to, for example, purchased intercourse,[105] the special circumstances of gays are easy to distinguish from those of people soliciting prostitutes. Though sodomy laws in general are "uncommonly silly,"[106] it may be that only as applied to gays are they unconstitutional—for only then do they violate free exercise principles, or, for that matter, Justice Kennedy's conception of metaprivacy as manifest in the Due Process Clause.

In sum, then, what I hope to have documented at this point is a constitutional ethic, manifest in the principled reasons that particular texts were adopted, which, if embraced, would justify a right to same-sex intercourse for gays. In the following section, I sketch a defense of the relevance of such an insight for the purposes of constitutional law.

---

[101] *Lawrence*, 539 U.S. at 567.

[102] *See, e.g.*, Rick Santorum, *Mending Morality*, NAT'L REV., July 22, 2005; Robert P. George, *Rick Santorum is Right*, NAT'L REV., May 27, 2003; Stuart Taylor Jr., *Santorum on Sex: Where the Slippery Slope Leads*, ATLANTIC, May 6, 2003; Whelan, *supra* note 2.

[103] *See* Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1435 (2006) (arguing that *Lawrence* is a move toward general "sexual sovereignty").

[104] Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

[105] RUBENFELD, *supra* note 21, at 188–89 ("I would like to see the argument explaining why prohibiting commercial sex is *not* legislating morality, whereas prohibiting homosexual sex *is*."); Whelan, *supra* note 2.

[106] *Lawrence*, 539 U.S. at 599 (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

II. Arguments from Text and Principle

My argument in the preceding pages is easily situated in an academic genre. As characteristic illustrations, consider Professor Koppelman's argument that the right to an abortion is best derived from the Thirteenth Amendment, because "forcing women to be mothers makes them into a servant caste";[107] Professor Amar's invocation of "the strong antisubordination ethic of the Thirteenth Amendment" as a ground for upholding a law criminalizing symbolic hate speech;[108] and Professor Scarry's proposal that because "the second amendment . . . protect[s] against the concentration of military power in the Executive . . . [it is] incompatible with our standing arrangements for the presidential first-use of nuclear weapons."[109] These are, undeniably, arguments from principle or ethic rather than simple text.[110] Indeed, they only conform to the constitutional text at all if some of its terms are read quite broadly. What justifies this modality of argument? In particular, why is it better to ground a constitutional ruling in a provision that seems too specific—such as a promise of autonomy, but only where "religion" is involved—than in a provision that seems too general—such as a promise of "due process," or respect for the "privileges [and] immunities of citizens"?

To answer this question, we must first reject the false choice between resting a decision on a specific provision (the Free Exercise Clause) and resting it on a general provision (the Due Process or Privileges or Immunities Clause). After all, any argument for the holding in *Lawrence* will draw its formal legal force from the general commands of the Fourteenth Amendment, because sodomy laws are state laws. As such, the real question is where interpreters should look for guidance when they seek to define the contours of the Fourteenth Amendment's hazy commitments to "due" liberty and respecting citizens' "privileges [and] immunities." For reasons I outline below, I maintain that close analysis of the principles underlying specific constitutional provisions is a powerful tool for this project. Note, however, that if the argument is constructed this way, the specific provision formally plays only a supporting role in the analysis. The objection that the Free Exercise Clause strictly protects only "religion" loses much of its force once we realize that, technically, it is the Fourteenth Amendment doing the work anyway; the Free Exercise Clause merely sheds invaluable light on the principles at stake in that Amendment's un-

---

[107] Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480, 484 (1990).

[108] Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 161 n.189 (1992).

[109] Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. Pa. L. Rev. 1257, 1267 (1991).

[110] *See* Philip Bobbitt, Constitutional Fate 93–177 (1982) (proclaiming and explicating the modality of "ethical argument").

derspecified commands. This light is certainly colored by the Clause's focus on religion, but there is no reason that it must be mechanically constrained by it.

Consequently, studying and applying the constitutional principles beneath texts is not at odds with adhering to the written Constitution. On the contrary, the greatest advantages of this method are its fidelity to and emphasis on the Constitution's text and history. First, those who argue from constitutional ethics and principles are not condemned to read open-ended provisions, such as the Privileges or Immunities Clause, out of the constitutional text.[111] Rather, as the text itself appears to require, we can take these non-clause-bound provisions seriously as a mandate for protecting unenumerated rights. As Dean Ely wrote:

> [T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.[112]

At the same time, however, neither are the adherents of this approach condemned to read the People out of the constitutional system. Instead, this method respects the limited role of the judiciary by deriving unenumerated rights from the hard-won principles cultivated by democratic movements and expressed through the constitutional text. Thus the question of what individuals are entitled to under the Fourteenth Amendment calls not for political philosophy from the ground up, but rather for thoughtful inference and generalization from the data points the Constitution itself provides—charging the Justices with inducing what the Constitution's conception of individual liberty is, rather than deciding on their own.[113] In this way we can come to terms with the Constitution's open-textured provisions by turning them back inwards, towards the text. Rather than authorizing courts to supply "constitutional" recourse even when the Constitution provides no remedy, we can ask courts to consider the contours of the People's principled commitments when determining how far the Constitution's vague and general textual enumerations extend.[114] Maybe most valuable

---

[111] *See id*. at 153 (suggesting that arguments from constitutional ethos "make useful what has been, up to now, a barren provision"). I diverge from Bobbitt, however, in my preference for principles that have "textual cousins." *Id*. at 143–44.

[112] ELY, *supra* note 30, at 28.

[113] For a related suggestion, see AMAR, *supra* note 33, at 299.

[114] *But see* BOBBITT, *supra* note 110, at 144 ("[T]here is simply nothing . . . to suggest that only the enumerated rights can lead us to the unenumerated ones."). It is certainly true that this method of deriving unenumerated rights is not uniquely determined by the text (nor is any other). Its appeal, however, is not that it is textually required, but rather that it conforms to the text's apparent commitment to unenumerated rights without forsaking the practical virtues of democratic participation and judicial restraint—which, as Ely stressed,

of all, by putting the history of constitutional enactment and amendment front and center, this method strives to engage the polity in an ongoing conversation over the meaning of our constitutional inheritance—what commitments are at stake, which normative dimensions define them, and how they apply to novel cases beyond the original applications of specific texts.[115]

Admittedly, whatever its advantages, this approach is most counterintuitive where the text appears most specific. It may seem perfectly natural to interpret a term like "unreasonable searches and seizures" with an eye to its underlying ethic of privacy;[116] but if the text says "religion," then maybe there is no need to turn to historical principles to clarify its meaning—at least, everyone knows that homosexuality is not a religion, if only because gay people do not claim otherwise. This distinction proves an illusion, however.

First, there are countless other plain meanings that are equally obvious, but which we would never count as dispositive in constitutional cases. In *Engblom v. Carey*, for example, the Second Circuit confronted the question of whether New York violated the Third Amendment by evicting striking corrections officers from on-site employee housing and replacing them with National Guardsmen.[117] Whether or not one finds a constitutional violation here, few would argue that the case is resolved by the simple fact that, as everyone knows, a tenant is not an "[o]wner," and an apartment is not a "house." Rather, the Amendment's principled reasons for protecting homeowners, and whether they apply in the instant case, seem to be the relevant considerations.

Of course, one might object that while the word "[o]wner" technically does not encompass tenants, the concepts are at least much closer in content than homosexuality and religion are. This may be true, but it is irrelevant. For what matters about an example like *Engblom* is precisely what it tells us about which axis we should look to in evaluating the proximity of concepts. Specifically, the question *Engblom* raises is not how similar an owner and a tenant are "in general," on some imaginary measure of the overlap in the words' semantic content, but rather how similar they are for the purposes of the Third Amendment—that is, how much alike

---

pervade the text as well. ELY, *supra* note 30, at 88–101. Still, I do not mean to claim here that no other theory of unenumerated rights is plausible, nor that unenumerated rights that do not follow from the principled penumbra of an enumerated right must, on this account alone, be rejected. Without engaging that question here, I mean merely to suggest that, because of its compromise virtues, generalizing from the principles beneath enumerated rights presents an especially appealing strategy for deriving unenumerated ones.

[115] Such questions figure prominently in Bruce Ackerman's account of "the problem of synthesis" and in Jed Rubenfeld's account of "radical reinterpretation." BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 87–89 (1991); RUBENFELD, *supra* note 21, at 3–19.

[116] In *Griswold v. Connecticut*, Justice Douglas did as much by deriving a broad "right of privacy" from the Fourth Amendment (in conjunction with the Third, Fifth, and Ninth). 381 U.S. 479, 484–85 (1965).

[117] 677 F.2d 957 (2d Cir. 1982).

they are in the respects relevant to the Amendment's animating principles and objectives. Whether the Amendment protects tenants, then, turns on a close analysis of the Amendment itself, specifically of whether its underlying values distinguish between owners and tenants. My argument for applying the free exercise principle to gays engages in precisely this kind of analysis. Thus the wisdom or folly of my proposal depends on the strength of the substantive argument, irrespective of the fact that homosexuality is not a religion—for just as plainly, tenants are not owners, pornographic films are not speeches,[118] and bills of pains and penalties are not bills of attainder.[119]

Unsurprisingly, then, this is also exactly the sort of analysis the Supreme Court has sometimes undertaken in its own efforts to define the sweep of "religion." "Religion" was narrowly theistic as understood and practiced at the Founding and at Reconstruction, but few urge such a narrow reading now.[120] The Court has at times embraced a shift in this direction quite enthusiastically, for example by affirming "religions in this country which do not teach what would generally be considered a belief in the existence of God," including "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."[121] Similarly, the Court has interpreted the Selective Service Act's requirement for conscientious objector status—opposition to all war on account of "religious training and belief"—extraordinarily expansively.[122] In *Welsh v. United States*, the Court held that this provision would apply to any individual who:

> deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, [because] those beliefs certainly occupy in the life of that individual a place parallel to that filled by . . . God in traditional religious persons.[123]

The *Welsh* standard states explicitly the same logic I have defended throughout, on which the question is not whether gays are a religion, but

---

[118] *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime").

[119] *See* Cummings v. Missouri, 71 U.S. 277, 323 (1866) (holding that "[w]ithin the meaning of the Constitution, bills of attainder include bills of pains and penalties").

[120] *See* REPORT TO THE ATTORNEY GENERAL, *supra* note 34, at 26–27.

[121] Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

[122] Welsh v. United States, 398 U.S. 333, 336 (1970).

[123] *Id*. at 340 (internal quotation marks omitted). Of course, this case involved only statutory interpretation, and some later constitutional cases have not observed this unusually expansive definition of religion. *See*, *e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (declaring that purely "philosophical" beliefs, comparable to Henry David Thoreau's, do "not rise to the demands of the Religion Clauses").

whether being gay parallels being religious in the senses relevant to the purposes and principles of the Free Exercise Clause.

In these cases as with the right of privacy in *Griswold*, then, the Court considered the normative stances underlying a right to determine how broadly it would construe the reference of the text's protection. It seems perfectly intuitive that in order to determine whether Secular Humanism falls within the reference of "religion," we should debate whether Secular Humanism shares the distinctive properties of religion that were thought to demand special protection. In just the same way, when we ask whether the choice to approve of and participate in same-sex intercourse is among a citizen's privileges and immunities—which include a right to free exercise of religion—we can turn to the texts' animating purposes and motivating values for guidance. As I have argued, these principles support including normative views and corresponding conduct which are characteristically private and in some sense unusually demanding—including some which are not, in any usual sense, "religions."

Conclusion

In terms of substance and method, I have made three claims. First, important principles underlying the protection of religious freedom at the Founding sweep broadly enough to encompass a right to same-sex intercourse for gays, because laws abridging this right share the features of noncompliance and invasive enforcement that prompted the Founders' concerns. Second, this conclusion is powerfully buttressed with the reformulation of religious freedom worked by the Fourteenth Amendment—as a liberty immune to scrutiny, privileged by virtue of its moral significance and its place within a private sphere beyond the reach of the state. Third, as a matter of interpretive method, these conclusions should be sufficient to protect the right to same-sex intercourse with the force of law, because we can best do justice to the broad commands of the Fourteenth Amendment by scrutinizing the other normative commitments embodied in the Constitution itself.

From the perspective of civil rights, gays and religious minorities are alike in many ways. Both identities are defined by a seemingly inextricable blend of inner experience and concomitant conduct. Moreover, in both cases this conduct might well arouse the disapproval of non-consenting parties, but in neither case can it be said to harm them. In addition, neither group can comfortably rely on the claim that membership is immutable or innate as a rationale for protection.[124] And because they can be made invisible to passersby, both identities permit "passing."[125] Perhaps most importantly, both sexual orientation and religious faith often exert

[124] *See* Yoshino, *supra* note 85, at 47–49.
[125] *See generally id.*

unusual influence on the course of a person's life by fixing the parameters of one's most fundamental interpersonal and existential objectives. Far from being contrived, then, it seems perfectly natural that the constitutional themes long understood to inform religious freedom should speak volumes about the rights of gays as well. The challenge is simply to listen to the principled undertones which resonate beneath the text, infusing its plain meaning with moral purpose.